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## Historical Aspects of Habeas Corpus

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## HISTORICAL ASPECTS OF HABEAS CORPUS

**T**HE history of mankind is a series of conflicts, sometimes sanguinary, sometimes bloodless, between ruling forces and the ruled. Over many centuries, the people have wrested, one by one, rights and privileges denied to them by sovereigns and retained control of them so that their liberty and well-being might be augmented.

One of the most precious and most fought over principles of justice centers around what is called the writ of habeas corpus, the bulwark of personal liberty. It is the great heritage of Anglo-Saxons everywhere and through many vicissitudes and setbacks it has survived as a shield for the oppressed and a barrier to the exercise of tyrannical power.

Many writers, in searching for the origin of this famous writ, have declared it to be lost in antiquity. That the writ, or some process similar to it, is of vast age is acknowledged. But, our real and direct knowledge of it comes to us first from Magna Carta, where the writ is indicated clearly.

Evidence is not lacking, however, to indicate that the writ is neither of native British origin nor of Teutonic origin, but that it came from that fountain-head of modern jurisprudence, the Roman law. It would seem probable that Rome gave us this process, as it has given us so many other tenets of law. Roman legions and Roman law conquered most of the then known world. The legions withdrew when the Barbarians invaded the Empire, but the law remained, then, as today, the source of rights and duties of the common people.

In the early days of Rome, the Tribunes, magistrates appointed to protect the plebeians against the oppressions, and injustices of the ruling patrician class, had great power given to them. This was vitally necessary, for the patricians, through their control of office, by virtue of wealth and birth, and through their interpretation of the laws, controlled not alone the affairs of the city but the lives and destinies of its people. The Tribunes were sole arbiters of the defendant's fate. They had complete power over the people. They could summon any citizen before them for trial, or could discharge

the debtor from arrest. Here, perhaps, because of the exigencies of the situation in which Rome found itself, lies the germ of that idea that justice shall not be delayed.

In the condensation and codification of Roman court decisions known as the Pandects or the Digest which was compiled by order of Justinian, we find a writ so similar to habeas corpus that there can be no doubt that in Rome lies the true origin. A learned writer<sup>1</sup> on the subject says "The writ (of habeas corpus) is somewhat similar to the Praetorian Interdict of the Roman Civil Law "*de homine libero exhibendo*," in which the praetor ordered, when it was made to appear to him that a freeman was restrained of his liberty contrary to good faith, that he be liberated. Church<sup>2</sup> also conservatively states that in the Roman interdict or writ "*de libero homine exhibendo*" we may discern the origin of our writ of habeas corpus.

The Pandects or Digest represents the sum total of Roman Legal achievement. It contains that which is known as the "Perpetual Edict" from the fact that these laws or policies of the current consul, contrary to the established custom, became a permanent part of Roman law.

In the first line of the "Perpetual Edict" we have the praetor summoning before him the freeman who has been unlawfully detained, by means of the writ called "*de homine libero exhibendo*" (produce the person). The writ was devised so that every freeman unlawfully detained might be instantly produced before the praetor to inquire into his detention.

The writ must have been used in England during the four centuries of Roman occupancy. After the Romans withdrew a period of confusion and chaos followed but the writ was revived and became an integral part of English law when order was once more established.

Slavery, of course, prevailed in Rome as it did elsewhere. A Roman citizen or freeman alone could avail himself of the writ and the emphasis, therefore, was upon the status of the petitioner and nothing else. In the course of centuries and when class distinctions had been softened, if

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<sup>1</sup> MYERS, TREATISE ON HABEAS CORPUS 11.

<sup>2</sup> CHURCH, HABEAS CORPUS 2.

not entirely abolished by Christianity, more and more of the common people could invoke the protection of the writ.

Six centuries elapsed between the coming of Augustine to Kent in 596 A. D. and the signing of Magna Carta in 1215. During those years the words "habeas corpus" were making their way into various writs, but it was not until many years later that they became a customary means of investigating imprisonment.

A common writ of the Middle Ages was the *capias* or warrant of arrest. *Capias* was a process on an indictment when the person was in custody and in cases not otherwise provided for by statute. There were several forms of this writ, entitled according to the purpose for which they were intended. *Capias ad respondendum* was a judicial writ by which actions at law were frequently commenced and which commanded the sheriff to take the defendant and keep him safely so that he might have his body before the court on a certain day to answer the plaintiff. *Capias utlagatum* lay against a person who had been outlawed in an action, by which the sheriff was commanded to take him and keep him in custody until the day of the return and then present him to the court to be dealt with for his contempt. By virtue of the *capias ad satisfaciendum* the sheriff could bring the prisoner to court to satisfy a judgment against him.

Blackstone mentions four writs, which at the beginning of the 13th century could be used to prevent unlawful imprisonment. They were writs of *mainprize*, *de odio et atia*, *de homine replegiando* and *habeas corpus*. The first writ mentioned early fell into disuse because of inherent defects. The writ "*de odio et atia*" was invented by Henry II to remedy abuses caused by the prevailing custom of trial by combat. A newer method was that of indictment brought by the king upon presentment of a jury. The former method was notorious for the injustice it caused, since many charges were prompted by hatred and malice. By the writ "*de odio et atia*" trial by combat could be avoided if the justice found that ill-will or hatred alone was the basis for charges. This writ is indicated in article 39 of Magna Carta as not to be denied but it was later abolished by a statute which was in

turn repealed so that, although Sir Edward Coke maintained it was still in force it also fell into disuse.

Another usual writ of the time was "*de homine replegiando*." This cast the responsibility for liberating his prisoner upon the sheriff or constable. Upon the giving of security for his appearance in court, the prisoner might, at the discretion of the sheriff, be released but the sheriff suffered the consequence if the prisoner did not appear at the time of trial. The sheriff had to keep in custody, however, one who was imprisoned by the King's especial command or if he had murdered or had violated some forest law or was in prison for an offense declared by law to be unbailable. But, as Blackstone says "the writ *de homine replegiando* was guarded with so many exceptions that it was not an effectual remedy in many instances" and this writ also fell into disuse.

The writ *corpus cum causa* was used extensively by the people as between themselves and the statute of 48 Edw. III, 22 refers to it. It was issued in the name of the King, and during the reign of Henry VI it was understood thoroughly by the judges as a writ to investigate the cause of imprisonment. It does not appear, however, to have been very effective in liberating a prisoner from custody who had been placed there by the King's especial command. The royal prerogative was still unchallenged.

Magna Carta marks a milestone in English legal history, not because of any great administrative or judicial reforms but because it gave in detail the duties and powers of those living under the Feudal Law.

It did not inaugurate any revolutionary policy nor promulgate any new theory of the rights of man but merely emphasized and reaffirmed certain cardinal principles upon which the feudal system has rested.

The Magna Carta, the Great Charter of English liberties, was the result of an effort on the part of the barons and nobles of the kingdom to ease some of the burdens imposed on them by King John. During King Richard's long absence in foreign lands, justice was a farce, the might of the strong triumphed and no man was safe from violence nor his possessions secure. The law was administered through

graft, corruption and violence by persons whose sole aim was their own aggrandizement.

When John came to the throne, conditions became even worse, because one more class had been added to the list of oppressed. This class, the barons, suffered greatly under John's reign. Many of their ancient rights and privileges were arbitrarily abolished and new duties imposed. The King increased and multiplied his rights under the feudal system; he violated terms of charters granted by his predecessors; he confiscated lands and property. Arbitrary imprisonment and increased charges such as scutage and castle guard, due to the King from the noble under the feudal system, were added to the list of grievances. To this general resentment of the curtailing of their ancient rights (which was merely a phase of the conflict between royal power and the nobility in the early age of most European countries) many of the nobles, for personal reasons, were desirous of limiting his prerogatives.

Some of the nobles looked downward to the commons and perceived the plight that the collapse of the judicial administration had cast them into and, hence, while the Charter was primarily intended for the benefit of the nobles, certain reforms were made which tended to better the lot of the commons.

The Charter embodied clauses which, it was hoped, would purge England of the hideous maladministration which covered it like a black cloud and give to individuals certain rights which not even the King could deny.

The document was signed by John at Runnymede, near Windsor, June 15, 1215. In 1299, by Statute 28 Edw. I, Magna Carta was declared to be observed as the Common Law of the Realm.<sup>3</sup> In spite of this, John and his successors constantly violated the terms of the Charter, particularly the one dealing with imprisonment (Ch. 39). But in the years that followed, the Charter was a standard to which flocked all lovers of liberty. "In Magna Carta we get the first attempt to the expression in exact legal terms of some of the leading ideas of constitutional government. It was

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<sup>3</sup> 1 BL. COMM. 128.

the first of many like services which the new common law was to perform. There was no attempt to destroy the foundations of law and orderly government which the crown had laid. The period in which the law developed by the crown alone was over; the period which will share in the establishment of a body which will limit the powers of the crown and share in the making of laws had begun. Meantime the common law was safe. The King himself was restrained but the law remained. With the perfecting of the restraints upon the royal power, it remained supreme."<sup>4</sup>

Certain clauses written down for the first time in Magna Carta, have survived in some form or another, in almost every modern constitution and in some cases the exact wording has been used.

"No freeman shall be taken or imprisoned or outlawed or exiled \* \* \* except by legal judgment of his peers."

"Justice shall not be sold, denied or delayed."

"Fines shall be imposed in accordance with the gravity of the offense but in no case shall they be so heavy as to deprive any man of his livelihood."

"Nothing shall henceforth be given for a writ of inquiry touching life or limb but it shall be granted freely and not denied."

In spite of writs and Charter, almost every sovereign of England attempted to assert the royal power as not being confined by the law. John, though compelled to sign the Charter, ignored it completely and Henry III confirmed the Charter in 1225, only because of a threat by Parliament to withhold subsidies. None succeeded in defying the King's arbitrary command of imprisonment until the case of Hubert De Brugh. This lord had been outlawed illegally by the King but in 1234, after strenuous efforts, he was successful in having the Royal Court (King's Bench) declare the command null and void as in violation of Magna Carta. It was the first breach in the sovereign power.

Originally there were seven different writs of habeas corpus. The one that has survived to this day is the writ of *habeas corpus ad subjiciendum*. This is a prerogative writ requiring the body of a person alleged to be unlawfully

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<sup>4</sup>2 HOLDSWORTH, HIST. OF ENG. LAW (3d ed. 1923) 169.

restrained to be brought before the judge or court that the lawfulness of the restraint may be determined. The case is disposed of on the hearing. The writ is addressed to the one who has custody of the detained person and he must state the cause and warrant for the detention.

For the next two or three centuries the writ of habeas corpus became the battleground of the courts. Sometimes the sovereigns were so strong and the judges so servile that one who was in prison "by command of the King" remained there. At other times the writ was freely granted by judges throughout England in spite of the King's displeasure. Slowly, however, the writ became an instrument of daily use in English legal life, encountering more and more seldom any setbacks from the royal power.

*Darnel's Case*<sup>5</sup> in 1627 precipitated a conflict between King and Parliament. Charles I was unpopular with Parliament and was constantly seeking to augment his "divine" right at the expense of the people. Charles had "requested" a "loan" from Darnel and four other knights. These "benevolences" or forced loans were common whenever the King needed money, which was often. Darnel and the others refused to contribute and they were thrown into prison *per special mandatum regis*. The warrant of arrest had been signed by two members of the Privy Council.

Darnel applied to the King's Bench for a writ of habeas corpus. It was issued but upon the trial, the prisoners were remanded to prison. The judges held office at the pleasure of the King and in this case superseded the legal process of law by an arbitrary one of their own. The chief justice, Sir Nicholas Hyde, upheld the crown on the flimsiest grounds. Even years later, the judges defended the right of kings, in the "Ship Money" case brought by John Hampden, asserting that in times of emergency, the King's prerogative was unlimited and took precedence over all statutes or charters of England. "If the judgment in the ship money case was more flagrantly iniquitous, it was not so extensively destructive as the judgment in the *Darnel Case*."<sup>6</sup>

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<sup>5</sup> 3 CAR I (1627).

<sup>6</sup> HALLAM, CONST. HIST. OF ENG. (1913) 4, 221.



*Darnel's Case* led to the enactment in 1628 of the Petition of Right<sup>7</sup> by Parliament and which was signed by the King for certain financial considerations. The Petition of Right prohibited the King from ordering arbitrary imprisonment and granted the writ of habeas corpus to one so committed upon his demand to the King's Court or to the Court of Common Pleas. This reaffirmed the right of habeas corpus and took an important step by extending the power of granting the writ to the Court of Common Pleas.

In 1679 when the second Charles was on the throne, a further step was taken by Parliament in solidifying and protecting the rights gained. This was the enactment of the Habeas Corpus Act<sup>8</sup> sometimes called Shaftesbury's Act, after its proponent, Lord Shaftesbury. It was the outcome of *Jenkes' Case* (1676) when Lord Chancellor Nottingham refused to issue the writ except during legal term when the court sat. The Act provided among other things, that the writ could be granted at times other than legal term, by the Lord Chancellor, returnable immediately and he could liberate the prisoner upon security for his appearance in court. It also provided that persons released on the writ should not be re-committed for the same offense except by the court having cognizance of the case. Heavy penalties were imposed upon judges who delayed the issuance of the writ or wilfully violated the terms of the Habeas Corpus Act.

All statutes heretofore passed concerning the writ of habeas corpus had provided for criminal cases only. In 1816 by statute<sup>9</sup> the writ was extended to cover cases where persons were unlawfully restrained in private custody. The most important provisions were:

1. The writ of habeas corpus shall be issued \* \* \* for persons restrained of liberty by other than criminal or civil process.
2. The judges shall examine into the truth of the facts and if there is a reasonable doubt as to the

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<sup>7</sup> 16 CAR I, c. 1088 (1628).

<sup>8</sup> 31 CAR II, c. 2 (1679).

<sup>9</sup> 56 GEO. III, c. 100 (1816).

legality of the imprisonment, the person should be released on bail.

3. The writ may be issued to cover all waters, ports, harbors, etc., on the coast of England. This was to take care of illegal detention on board ship.

The application of the writ was still limited to Great Britain, but in 1861 the writ was permitted to run from the English Court throughout the British Empire except in those colonies and dominions where the local courts had authority to issue it.

In the cases of *Cox v. Hakes*<sup>10</sup> and *Ex parte Art O'Brien*<sup>11</sup> it was held that whereas an appeal against refusal of the writ might be taken by the appellant to the House of Lords, the Crown cannot appeal against the grant of the writ.

Today the writ of habeas corpus must be granted in any land under the British flag. It may emanate from any court named by statute and at any time.

"The writ of habeas corpus is one of the four important means whereby the power of the sovereign has been limited."<sup>12</sup> To it in large measure, do Anglo-Saxons throughout the world owe their freedom from oppression and their reputation as a liberty-loving people.

The American colonies, while still under the rule of England, always considered the writ as one of their rights, guaranteed to them by the various charters and statutes as to native-born Englishmen. Although no colonial charter specifically mentions the writ, all of them granted to the colonists all the rights and privileges enjoyed by the inhabitants of the British Isles.

Generally, during colonial history, the writ was granted without question. In some cases, particularly under the governorship of Sir Edmund Andros, the writ was suspended, but not for long. Under his administration, "Magna Carta was no protection against abolition of the right of habeas

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<sup>10</sup> 15 A. C. 506 (1890).

<sup>11</sup> [1923] A. C. 603.

<sup>12</sup> 1 HAYES, HIST. OF MOD. EUROPE (1929) 432.

corpus.”<sup>13</sup> But in spite of Andros' vociferous denial “Do not think the laws of England follow you to the ends of the earth”<sup>14</sup> the laws of England did operate in the American colonies.

When the writ was denied, public opinion and legal circles were so aroused that the judges felt the full weight of disapproval. In Massachusetts, in 1689, a tax had been levied oppressively and unlawfully. The Reverend John Wise, an itinerant preacher, refused to pay the tax and denounced it violently and often. He was arrested and imprisoned and petitioned for a writ of habeas corpus. Judge Dudley refused to issue the writ. Wise sued the judge in a civil proceeding and won.

In New York, in 1707, Governor Cornbury issued a warrant of arrest illegally for two ministers of the gospel, Malkemie and Hampton. It was alleged that they had neglected to procure from the governor licenses to preach. Their imprisonment was of short duration, since a writ of habeas corpus was granted and on its return, they were released.

The New Jersey Assembly, in 1710, by resolution denounced judges who had refused to issue the writ to one Thomas Gordon.

When the Federal Government was organized its powers, duties and rights were purely statutory since, unlike the states, it had had no previous existence. The Constitution of the United States<sup>15</sup> provides that the writ “shall not be suspended unless \* \* \* the public safety requires it.” This clause was proposed by Pinckney in the Constitutional Convention and was a deviation from Morris' original proposal. It is followed in this by most of the states though in some states suspension of the writ is absolutely forbidden while in others, the duration of suspension is limited.

Originally, there was only one method by which a writ could be issued out of a Federal Court. The Federal Judiciary Act of September, 1789<sup>16</sup> provided that the writ could

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<sup>13</sup> 1 HAWTHORNE, HIST. OF U. S. (1898) 237.

<sup>14</sup> *Ibid.*

<sup>15</sup> U. S. CONST. ART. I, §9 (2).

<sup>16</sup> 1 STAT. 81 (1789), 28 U. S. C. A. §451 (1926).

be issued only when the prisoner was committed to prison, under or by color of authority of the United States. The case of *Ex parte Dorr*,<sup>17</sup> illustrates the attitude of the Federal Court. Thomas Dorr was tried in Rhode Island for treason, not against the nation but against the state. He sought a writ of habeas corpus before the Supreme Court of the United States. In refusing to grant the writ, the court held "Neither the Supreme Court nor any other court of the United States can issue a habeas corpus to bring up a prisoner, who is in custody of a state, for any purpose \* \* \*."

The Federal Courts were loath to inquire into the administration of the state courts but the famous Nullification Movement in South Carolina, led by John Calhoun, was the prime reason for a series of acts passed by Congress which enabled the Federal Courts, in some measure, to supervise what had formerly been purely state matters. These acts<sup>18</sup> extended the power of the Federal Courts to issue writs in cases where prisoners were held in custody by states, in violation of the Constitution, laws or treaties of the United States. Rev. Stat. 753<sup>18a</sup> provided—"the writ shall not extend to a prisoner unless he is in custody (of a state) for an act done or committed in pursuance of a law of the United States \* \* \* or in custody in violation of the Constitution, of a law or treaty of the United States." Under this section, writs were issued in certain cases of "urgency" where the prisoner was in state custody, and the federal government was involved.<sup>19</sup>

*In re Neagle*<sup>20</sup> illustrates clearly what the court termed "cases of urgency" in which the Federal Courts will intervene. The petitioner was a David Neagle, who had been a deputy marshal of the United States for the District of California. He was assigned as a bodyguard to Justice Field, of the United States Circuit Court, who had received

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<sup>17</sup> 15 U. S. 320 (1844).

<sup>18</sup> 4 STAT. 634 (1833), 28 U. S. C. A. §452 (1926); 5 STAT. 539 (1842), 28 U. S. C. A. §453 (1926); 14 STAT. 385 (1867), 28 U. S. C. A. §453 (1926).

<sup>18a</sup> 14 STAT. 385 (1867), 28 U. S. C. A. §453 (1926).

<sup>19</sup> *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734 (1886); *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. 385 (1886); *In re Lovey*, 134 U. S. 372, 10 Sup. Ct. 584 (1890); *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658 (1890); *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30 (1894).

<sup>20</sup> *Supra* note 19.

several intimations that his life was in danger. While in the performance of his duty, Neagle shot and killed David Terry, who, it was alleged, had attempted to murder Field. Neagle was arrested for murder on a state warrant. He petitioned the Federal Court for a writ of habeas corpus. It was held that Neagle was an officer of the United States and that he was in custody of a state for an act done in pursuance of an order of the United States.<sup>21</sup> A writ of habeas corpus was issued and a trial of the facts held. Neagle was discharged from the custody of the state of California.

"It is thus only in cases of peculiar urgency that the federal courts will interfere in the first instance by habeas corpus where a prisoner is in state custody. But in the exercise of its appellate jurisdiction it may issue the writ to inquire into the validity of a detention, under authority of an inferior court, to determine if jurisdiction and authority are present."<sup>22</sup>

In *Whitten v. Tomlinson*<sup>23</sup> the petition and return showed that the petitioner was detained in custody of the sheriff under commitment after having been brought from Massachusetts to Connecticut on the application of the governor of the latter state. This was an appeal from a decree of the Circuit Court denying the writ. Mr. Justice Gray, after discussing the various methods used for bringing proceedings begun in state courts to the federal courts, continued, "There could be no better illustration than this case affords of the wisdom, if not the necessity, of the rule \* \* \* that a prisoner in custody, under authority of a state, should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States, upon a writ of habeas corpus, in advance of a proceeding in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of \* \* \* jurisdiction of the states and with the performance by this court of its appropriate duties."<sup>24</sup>

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<sup>21</sup> *Supra* note 18a.

<sup>22</sup> *In re Neagle*, *supra* note 19.

<sup>23</sup> 160 U. S. 231, 16 Sup. Ct. 297 (1895).

<sup>24</sup> *Ibid.*

In *Ireland v. Woods*<sup>25</sup> the petitioner was arrested in New York and at the request of the Governor of New Jersey, extradited to that state. In refusing to grant a writ of habeas corpus, the court said, "The validity of a statute is not drawn into question every time rights claimed under such statute are controverted nor is the validity of an authority every time an act done by such authority is disputed."<sup>26</sup>

The Federal Constitution does not provide a method for suspending the writ of habeas corpus. At the beginning of the Civil War, President Lincoln, by proclamation, suspended the writ. At once, the question arose: In what branch of the government, executive or legislative, is vested the power to suspend the writ. Great controversy arose not only in legal circles but among laymen. Argument waxed furiously and a veritable hail of pamphlets and articles, some attacking the President's act as a usurpation of power, others upholding his right, flooded the nation. The authors<sup>27</sup> did not, apparently, consider the question settled, academically, at least, even after Chief Justice Taney, in 1861, in *Ex parte Merryman*,<sup>28</sup> held that Congress alone possessed the power of suspending the operation of the writ. Other opinions<sup>29</sup> upheld this view though there were dissenting opinions.<sup>30</sup>

Practically, the situation was settled by Congress which on March 3, 1863, authorized the President to suspend the writ, when in his opinion, the state of the country demanded it. It was held, however, that during the suspension, persons who had a claim for unlawful imprisonment still had their common law right for false imprisonment and malicious prosecution.<sup>31</sup>

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<sup>25</sup> 246 U. S. 323, 38 Sup. Ct. 319 (1918).

<sup>26</sup> *Ibid.*

<sup>27</sup> A few of the leading ones are: BINNEY, TREATISE ON HABEAS CORPUS; BULLIT, REVIEW OF BINNEY'S TREATISE; MONTGOMERY, REMARKS ON BINNEY'S TREATISE; KENNEDY, WRIT OF HABEAS CORPUS; GROSS, WRIT OF HABEAS CORPUS.

<sup>28</sup> Fed. Cas. 9,487, Taney 246, 9 Am. L. Reg. 524 (1861).

<sup>29</sup> *Griffen v. Wilcox*, 2 Ind. 370 (1863); *In re Kemp*, 16 Wis. 359 (1863).

<sup>30</sup> *Ex parte Field*, Fed. Cas. 4,261, 5 Blatchf. 63 (1862).

<sup>31</sup> *Ex parte Bollman*, 2 U. S. 554 (1807); *Johnson v. Duncan*, 3 Mart. (O. S.) 530, 6 Am. Dec. 675 (La. 1815); *In re McDonald*, 49 Mont. 454, 143 Pac. 947 (1914).

In *Ex parte Milligan*,<sup>32</sup> a case arising out of the suspension of the writ, it was held that suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course and on its return, the court decides whether the applicant is denied the right of proceeding further.

Lambdin Milligan was arrested by the military authorities of the department of Indiana on a charge of aiding and abetting the Confederate forces. He contended that since Indiana was not within the military zone of operations, he was entitled to a writ of habeas corpus and a trial by the civil authorities. Eminent counsel were on both sides of the argument. Milligan lost his motion.

"A distinction has been made, however, between the suspension of the privilege of the writ in a constitutional sense and the right of a military commander to refuse obedience to such a writ when justified by the exigencies of war or the *ipso facto* suspension which takes place whenever martial law exists and it has been held entirely competent for the officer in command to suspend or discharge writs when necessary."<sup>33</sup>

In some states the writ is considered of such great importance and protection against unlawful and unjust power that the suspension of the writ is forbidden by their constitutions while in other states, the time during which it may be suspended is limited, usually, to three or six months. Originally, this had also been the intention of the framers of the Federal Constitution.

Massachusetts is the only state that ever suspended the operation of the writ. This occurred during the early years of its statehood from November, 1786, to July, 1787, when the so-called Shay's Rebellion threatened to overthrow the Commonwealth.

During the War of the Rebellion, the entire Confederacy was involved when the Confederate Government suspended the writ for the duration of the War.<sup>34</sup>

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<sup>32</sup> 71 U. S. 2 (1866).

<sup>33</sup> *In re Boyle*, 6 Idaho 609, 57 Pac. 706 (1889).

<sup>34</sup> *In re Cain*, 60 N. C. 525 (1864); *State v. Sparks*, 27 Tex. 705 (1864).

New York follows closely the Federal Government in its Constitution<sup>35</sup> in its provision regarding the writ of habeas corpus. When the Civil Practice Act was adopted, succeeding the Code of Civil Procedure, it prescribed rules and regulations for the issuance of the writ.<sup>36</sup> It is interesting to note that the Attorney-General or District Attorney may, unlike in England, appeal from a final order discharging the prisoner on a writ of habeas corpus.<sup>37</sup> Section 1274 allows the prisoner to appeal from an order denying release.

The principal inquiry of the writ is as to the jurisdiction or power of the person or tribunal to detain the individual imprisoned or restrained. If the power exists and the magistrate has authority to pronounce the judgment for the cause assigned, the statute forbids review of his decision by this writ; if not, the prisoner is discharged. No errors of law or judgment will be inquired into and corrected.<sup>38</sup>

Persons accused of violating the Prohibition Law have found an ally in the writ. It was held, in *Matter of Horschler*,<sup>39</sup> that the writ will lie to discharge the prisoner after conviction, on a charge of possessing liquor where the only evidence was that of a police officer who entered relator's house without a warrant and found liquor therein.

Except in rare cases where the facts before the court cannot be materially changed, qualified or explained, important issues should not be determined in a habeas corpus proceeding.<sup>40</sup>

The writ of habeas corpus, throughout the centuries, has grown but slowly. It overcame the tremendous forces bent

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<sup>35</sup> N. Y. CONST. art. I, §4.

<sup>36</sup> N. Y. C. P. A. §§415, 1230, 1274, 1275.

<sup>37</sup> N. Y. C. P. A. §1275.

<sup>38</sup> *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559 (1875); *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 64 N. E. 825 (1902); *Bungart v. Wells*, 57 App. Div. 140, 68 N. Y. Supp. 59 (2d Dept. 1901); *Price v. Hayes*, 151 App. Div. 561, 136 N. Y. Supp. 854 (2d Dept. 1912).

<sup>39</sup> 116 Misc. 243, 190 N. Y. Supp. 350 (1921).

<sup>40</sup> *People ex rel. Collins v. McLaughlin*, 194 N. Y. 556, 86 N. E. 1119 (1909).



upon its extinction and extended itself, with altered political and social conditions, to rest like a protecting hand, over our entire legal fabric. When injustice can no longer harm, then habeas corpus will have outlived its usefulness. Until then, it is a mighty shield.

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